No 534

SUPREME COURT OF THE UNITED STATES

October Term 1946

◆

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA

Respondent

◆

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

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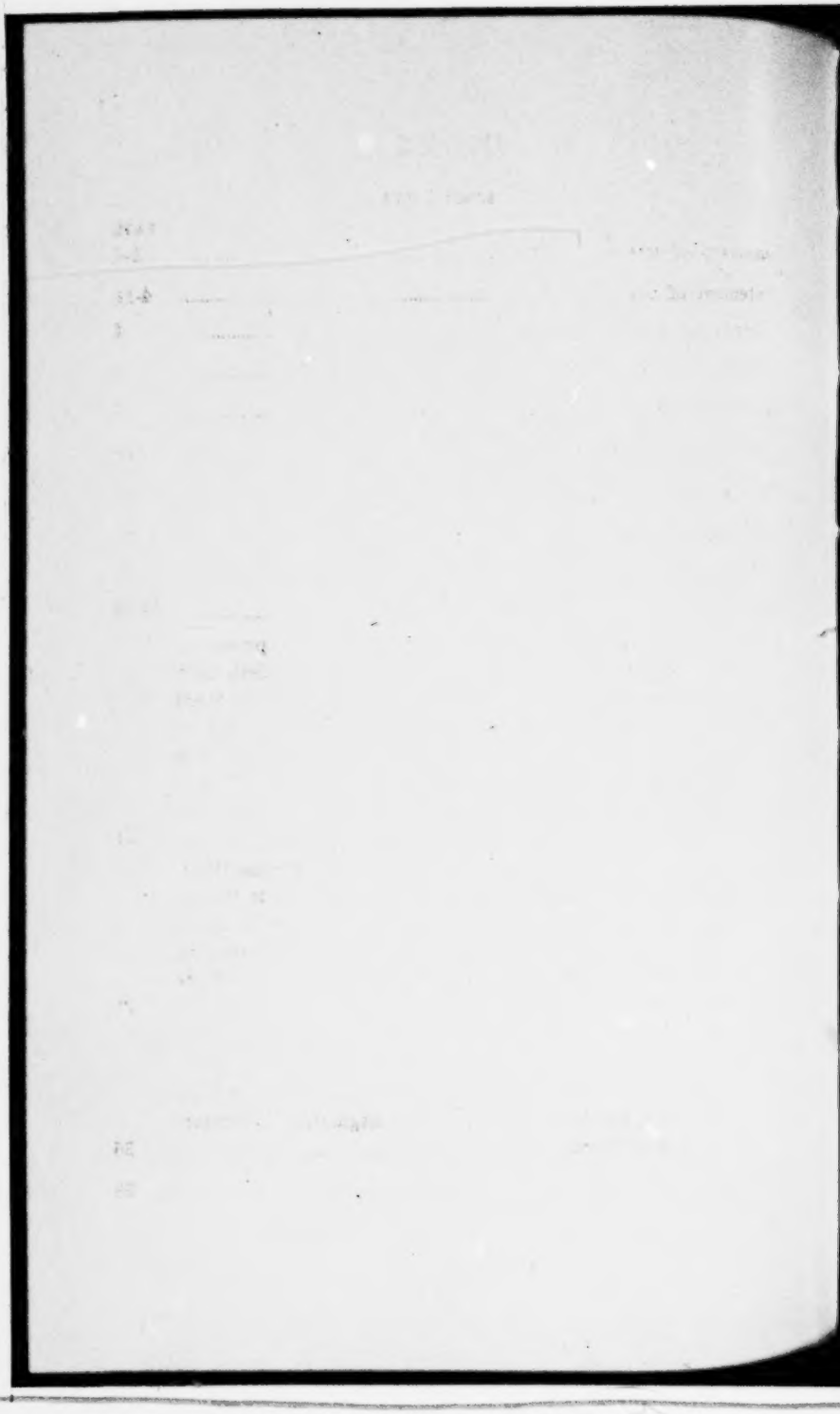

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TO THE SUPREME COURT OF THE UNITED STATES:

Louis Dabney Smith petitions this court for a writ of certiorari. He shows unto the court as follows:

Summary of Matters Involved

1. *Preliminary statement.*

The judgment of the court below is not a final order. The court below affirmed that part of the judgment of the trial court refusing to grant the motion for judgment of acquittal dismissing the indictment, but reversed the case for prejudicial error committed by the trial court.

Petitioner requests this Court to grant the certiorari to determine whether or not the controversy should be ended now by a dismissal of the indictment. Extraordinary and exceptional circumstances of the case warrant the granting of certiorari, although the judgment of the trial court was reversed by the court below and the cause remanded for a new trial. See *Jurisdiction of the Supreme Court of the United States,* Robertson and Kirkham, pp. 623-628;

Hanover Star Milling Co. v. *Metcalf*, 240 U. S. 403; *Forsyth* v. *Hammond*, 166 U. S. 506; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418.

2. *Opinion of court below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter, but appears in the record. [340-353]*

3. *Jurisdiction.*

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

4. *Timeliness of this petition.*

The judgment was rendered and entered on July 29, 1946. [353-354] Petitioner applied for an extension of time in which to file the petition for certiorari. The Chief Justice of the United States granted the application. The time within which to file the petition was extended to and including September 27, 1946. [357] The petition is filed within the extended time.

5. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 601.5, 603.59, 615.81, 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2 626.1, 626.2, 626.3, 627.13, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

* Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of the record.

6. *Questions Presented.*

1. Did the court below err in failing to order the indictment dismissed because the undisputed evidence, fully developed, showed that the local board, which issued the order supporting the indictment, failed to make a record of oral evidence given at a personal appearance as required by the Selective Service Regulations, thereby depriving petitioner of a full and fair hearing before the board of appeal, contrary to the due process clause?

2. Did the court below err in holding that whether the petitioner actually gave additional facts which were not included in the record was a question of fact for the jury to decide, when the undisputed evidence conclusively showed that additional testimony was given which the local board considered and admittedly did not reduce to writing as required by the Regulations?

3. Is the interest of petitioner in the outcome of the trial sufficient to present an issue of fact as to his uncontradicted testimony about evidence given to the local board which admittedly was not reduced to writing, especially when his testimony is unimpeached and corroborated by draft board records?

4. Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed that the local board refused to reopen petitioner's case upon tender of written evidence covering the facts that the local board had previously failed to reduce to writing and forward to the board of appeal, contrary to the Regulations?

5. Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed that the order to report for induction was void because issued and signed by the clerk rather than by a member of the local board, contrary to the Regulations?

6. Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed

that the administrative agency, at the time of the final classification, arbitrarily and capriciously denied petitioner his claim for exemption as a minister and classified him as liable for training and service without basis of fact?

7. Did the court below err in failing to hold that the trial court should have granted petitioner's motion for judgment of acquittal presented at the close of all the evidence, because the undisputed fully-developed evidence showed that the order supporting the indictment was void?

Statement of Case

Form and History of Action

This criminal action was begun by indictment returned against Louis Dabney Smith charging him with violation of the Selective Training and Service Act of 1940, as amended. [2] The indictment charged that he unlawfully and knowingly refused and failed to submit to induction, after reporting for induction, upon final physical examination. [2] Petitioner pleaded not guilty. [3] Trial to a jury began March 25, 1946. [3] At the close of all the evidence a motion for judgment of acquittal was made. [188-192] On denial thereof exception was taken. [193] At the close of all the evidence, requested charges were submitted to the court. [193-195, 247-289] Before argument of counsel, the trial court indicated which requested charges would be given and which refused. [193-195] After counsel's summation to the jury, [195-238] the court charged the jury, [238-290, 299] indicating what portion of his charge was petitioner's requested instructions. [246-247] Petitioner objected and excepted to the court's charge, and over the refusal to give certain of the requested charges. [291-299] The jury returned a verdict of guilty on March 27, 1946. [1, 300] Immediately following the verdict, petitioner was sentenced to serve 3½ years in the custody of the Attorney General. [1, 305] On March 27, 1946, petitioner

filed his written notice of appeal. [305] He was admitted bail on grounds that substantial questions were involved which should be decided, [305] and which support each ground of this petition for writ of certiorari.

Facts

Louis Dabney Smith registered with Local Board No. 68, Columbia, South Carolina, under the Selective Training and Service Act on December 24, 1942. [5, 118] He was mailed a questionnaire on January 21, 1943. [6, 118] It was filled out and returned to the local board on January 29, 1943. [6, 118] In the questionnaire, he stated: "'Education'—I have completed 8 years of elementary school and 3 years of high school. I have had the following schooling: University of South Carolina, course of study, engineering, length of time attended, one and one-half years; home study course for the ministry, 4 years. . . . 'Present Occupation or Activity'—I am majoring in engineering preparing for B. S. Degree at University of South Carolina. . . . I do intend to take an examination for license in engineering. . . . 'Occupational Experience, Qualifications, and Preferences'—occupation, ministry, kind of work done, as shown at Acts 20:20 and Luke 8:1 in the Bible; years worked, 1938 to date. My usual occupation, or the occupation for which I am best fitted, is ministry; . . . I prefer the following kind of work: ministry. . . . 'Minister, or Student Preparing for the Ministry', I am a minister of religion. I do customarily serve as a minister. I have been a minister of the Jehovah's Witnesses since Sept. 1938. I have been formally ordained, scripturally ordained as shown by Luke 20:1, 2 and John 16:14, Isa. 61:1, on Sept. 1938. . . . ¶ In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class *4D*."* [6-7, 118] Petitioner thereupon filed, on Feb-

* Classification of minister of religion under Sec. 622.44 of Regulations.

ruary 8, 1943, Special Form for Conscientious Objector, Form 47, for the purpose of elucidating on his training for the ministry and his claim for exemption as a minister of religion. [20, 119-122] In this special form he stated, among other things: "I acquired my belief from the Bible, which is God's Word and which I have studied in well organized classes for four years under the direction of the Watchtower Bible & Tract Society of Brooklyn, New York. . . . I have devoted on the average of 20 hours per week for the last four years studying and preaching the gospel of God's kingdom as set forth in 2 Timothy 2:15, Acts 20:20 and Matthew 24:14." [120] The special form further showed: "'Types of Work, Ministry,' and from 1938 to date. . . . (a) State the name of the sect, and the name and location of its governing body or head if known to you: Jehovah's Witnesses. Watchtower Bible & Tract Society, Brooklyn, N. Y. (b) When, where, and how did you become a member of said sect or organization? In nineteen hundred thirty-eight at Columbia, S. C. by studying literature of Jehovah's witnesses with the Bible." [121]

Along with this evidence, he filed a petition and affidavit signed and sworn to by twenty-nine persons which stated: "To Whom it May Concern: We the undersigned have known Louis Dabney Smith from two to five years and know him to be a duly ordained minister as set forth in the scriptures, and that during our acquaintance with him he has been actively engaged as a minister and is serving in the capacity of advertising servant for the Columbia, S. C. Company of Jehovah's Witnesses. [122, 124]

Additionally he filed another like petition and affidavit signed and sworn to by forty-three persons which stated: "This is to certify that we the undersigned have known Louis Dabney Smith from two to four years and know that he is a duly authorized representative of the company of Jehovah's Witnesses to preach the gospel of God's kingdom

and is duly anointed by Jehovah God as such as set out in Isa. 61:1, 2, 1 John 2:27 and other scriptures of the Bible, and, as such, he is actively engaged as a regular minister of the gospel under the Watchtower Bible and Tract Society of 117 Adams St., Brooklyn, N. Y." [122, 124-125]

Supporting this evidence there was a certificate of ordination duly issued by the Watchtower Bible & Tract Society, certifying that Louis Dabney Smith was a duly ordained minister, preaching the gospel of God's kingdom regularly as one of Jehovah's witnesses in obedience to the commandments of Almighty God and under the direction of the Watchtower Bible and Tract Society. [122-123, 125-126]

The local board about the same time mailed him an Occupational Questionnaire which he filled out showing that completion of the engineering course at the University of South Carolina was indefinite; [25, 123, 126-127] that he was a student and a minister; had been in the ministry for four years beginning in 1938; [127] that the duties of his present job was to preach the gospel and that his only work was the ministry, which was the job for which he was best fitted. [127] Along with this evidence, he filed a copy of Opinion No. 14, Amended, of National Headquarters of Selective Service System showing the status of Jehovah's witnesses as regular and ordained ministers under the Act. [127-130]

On April 2, 1943, he was placed in Class I-A, making him liable for training and service in the armed forces. [8] He received notice of this classification through the mails on April 6, 1943. [130] Immediately he wrote the local board for a personal appearance. [131] On April 12, 1943, he appeared. [8, 131] The members of the local board summarily denied him the right to produce oral testimony and commanded him to file with the board the written

memoranda that he had with him. [131-132] Thereafter, on May 18, 1943, his classification was changed from Class I-A to Class I-A-O, making him liable for limited training and service in the armed forces as a conscientious objector. [8, 132] Immediately thereafter Smith requested another hearing, which was granted for May 25, 1943. [132] He appeared, this time without any written information because of the arbitrary action of the local board on his previous hearing in denying him the right to give oral testimony because he possessed written memoranda. [8, 131-132] The minutes of the local board show that there was a "lengthy discussion" at the hearing on May 25, 1943. [8] Petitioner testified as to the length of this discussion and the oral evidence submitted by him quite extensively, without objection on the Government's part. He testified on the witness stand for about forty-five minutes about the additional oral evidence he gave at his personal appearance. [132-142] He began the hearing by reviewing all the documentary evidence before the local board. [132-133] It is significant that the chairman of the local board had not seen any of Smith's documentary evidence before May 25, 1943. [134] The chairman admitted this in spite of the fact that the board had previously classified him in I-A on April 2, 1943, and had heard him at a personal appearance on April 12, 1943. [29, 35, 132] Smith pointed out that the undisputed documentary evidence corroborated by the affidavits of over forty people showed that he was regularly teaching and preaching as an ordained minister. [132] The chairman admitted there was no evidence of any kind or character in the draft board file to dispute the documentary evidence submitted by Smith. [29, 35]

Smith explained extensively at the hearing before the local board about his background, schooling and training for the ministry. [133-134, 136] He showed that he had pursued a diligent course of study for years at home under

the tutelage of his grandparents and his mother in preparation for the ministry. [133, 136] He also showed that he had regularly attended a divinity school two times each week, two hours each session for several years. [134, 137] He showed that the course of study covered the Bible, Bible research, Bible history, Bible concordances, public speaking, English and other subjects. [137] He showed that after he had completed these courses, his qualification for preaching was established, whereupon he was ordained and credentials of ordination duly issued to him. [137, 139]

On the occasion of such hearing, there was a discussion between him and the members of the board about whether he intended to finish his course in engineering and become an engineer. He pointed out, at that time, that upon his graduation from high school, he intended to enter the full-time ministry, that because his father was not one of Jehovah's witnesses and was prejudiced against his becoming a minister of Jehovah's witnesses and had threatened him, he had capitulated to his father's demands and enrolled in the engineering course at college. [135, 140, 141] He pointed out that even while he was pursuing the course of engineering he continued to regularly teach and preach as a minister devoting from thirty to eighty hours monthly therein. [135, 139] He showed that due to his increased activity in the ministry, he failed in a number of subjects in college. [135] Moreover, he told the local board that he was quitting college within thirty days and that he had actually filed a written application to become a full-time pioneer minister, representing the Watchtower Bible and Tract Society and that he would actually enter that missionary work on June 1, 1943. [140, 141] He showed that this was his actual intention at the time he graduated from high school and that he was going to put that lifelong desire into operation immediately, thereby changing his status from a part-time to a full-time minister and com-

pletely abandoning his status as a student in the engineering school at college. [141] He pointed out that his choice of minister as his life work was not a recent choice due to his being confronted with the draft law, but that when but a small child, he, his grandparents and his mother had chosen the full-time ministry as his profession and occupation to follow throughout life. [136, 141] He showed that the fact that he was ordained at an early age corroborated his claim as a minister and was no ground for denying his claim for exemption as a minister, because history and the Bible establish the fact that many ministers began preaching at a very early age. [140] In this connection he showed that he had completed the full prescribed course of study which is ordinarily given to adults, at the time he began practicing his ministry at the age of 14. [140] He showed that his duties as an ordained minister required him to act as assistant to the "company servant" and presiding minister of the congregation of Jehovah's witnesses at Columbia. [138-139] He showed that these duties required him to devote at least 80 hours monthly; [139] that he regularly delivered sermons before the congregation; [138] that he performed ceremonies ordinarily performed by ministers and that he stood in relation to the congregation of Jehovah's witnesses as do the clergy of the orthodox religions toward their congregations; [138] that he supervised the work done by Jehovah's witnesses in Columbia; [139] that he regularly performed missionary evangelistic work from house to house [137] and regularly made back calls upon the people and conducted Bible studies in their homes as various small congregations. [138]

The chairman of the local board testified that the members of said local board considered all this oral evidence which was offered at this concededly extensive hearing

and that they did not refuse to consider any of the evidence, but on the contrary gave full consideration thereto and that Smith received a fair hearing. [28-29] *

It was especially important that the local board reduce to writing all of the oral evidence offered by petitioner at the hearing in view of the fact that petitioner at the close of the hearing asked the board if it was necessary for him to file any additional written evidence to corroborate the oral testimony and documentary proof that had theretofore been filed. In spite of his offer to produce an abundance of additional written proof the board informed him positively that it was not necessary that this be done. [141]

Again the chairman admitted that there was no evidence which was received by the board that in any way contradicted the evidence produced by Smith as to his ministerial activity, his intention to become a full-time pioneer minister, and his standing as a minister of the gospel with Jehovah's witnesses and the Watchtower Bible & Tract Society. [35-36, 37, 134]

At the close of the hearing Smith was excused for a few minutes and then called back and informed by the local board, on May 25, 1943, that his classification in I-A would be continued. [141, 142] On May 25, 1943, following the

* The Regulations require that if oral evidence is given at a personal appearance, which is considered by the local board, it is the duty of the local board to prepare a summary of such evidence in writing and file it in the cover sheet of the registrant for the consideration, use and benefit of the board of appeal and upon appeal to the President by the Director of Selective Service. (§§ 625.2 and 627.13(b)). It was especially important that the evidence at this hearing be reduced to writing because the chairman stated that the main and principal reason, if not the only reason, petitioner was denied his claim for the ministry was because he was studying to be an engineer. [29] The undisputed evidence at the hearing showed that he intended to discontinue studying at college and enter full-time pioneer missionary work, which would have required the local and appeal boards and the President to consider his case on the basis of his standing as a full-time missionary evangelist rather than as a part-time minister studying at college for engineering. [36-37, 148] See *Hull* v. *Stalter,* (CCA-7) 151 F. 2d 633.

hearing Smith emphasized that he was not requesting and would not accept classification as a conscientious objector but that his exclusive claim was as a minister of religion. [8, 143] In connection with this statement he filed a written notice of appeal on May 25, 1943. [143-144] The board of appeal classified him in I-A on June 15, 1943. [8, 145] Because one member of that board dissented, petitioner had the right of appeal to the President.* This he did by filing a written statement of appeal to the President on June 22, 1943. [9, 145-146] On July 23, 1943, the President placed him in Class I-A, notice of which petitioner received August 8, 1943. [9, 146]

Having failed to secure his exemption from all training and service on appeal, Smith for the first time realized that the local board had falsely told him that he did not need to submit additional written evidence to corroborate his claim. [146] In view of there being nothing on file in writing to show the change in Smith's ministerial status, and to establish the abundance of corroborative oral evidence he had given at the hearing, Smith then set out to procure additional written evidence. He obtained extensive affidavits from 25 persons. [36-37, 146-147-148] He also prepared two elaborate written affidavits signed by himself. [148] This written proof showed his change of ministerial status from part-time to full-time minister and his having renounced his intention to pursue his engineering course further. [30-31, 36, 148] He also obtained an ordination certificate duly sworn to showing that he actually began performance of full-time pioneer ministry on June 1, 1943. [146, 148] This evidence in writing established all of the facts that he had submitted orally to the local board on May 25, 1943, [131-141] but which had been illegally and unlawfully withheld from the board of appeal and the President by the local board, contrary to the Regulations. Thereupon Smith took this new evidence to the Government

* Section 628.2 of the Regulations.

Appeal Agent in Columbia, South Carolina, who was impressed with the importance of the new evidence. [147] The Government Appeal Agent, associated with said local board, immediately requested the board to reopen and reconsider petitioner's classification. [147, 150] The local board denied the request of the Government Appeal Agent, [147] whereupon Smith appeared before the board in person and requested them to reopen and reconsider his classification anew because the Selective Service System had not had a full and fair opportunity to obtain all the truth pertaining to his classification. [147, 150] This request was denied. [37, 147] The local board arbitrarily and capriciously held that this was not new evidence sufficient to warrant a reopening of the classification, in view of previous illegal withholding of the same evidence submitted orally from the appeal agency of the Selective Service System. [37]

On September 18, 1943, the local board ordered Smith to report for induction on September 30, 1943. [2, 9, 155] Smith, not intending to report, was kidnaped by some peace officers of the State of South Carolina at the instance of his father—not one of Jehovah's witnesses—and taken to Fort Jackson, South Carolina. [155] At this induction station he completed the selective screening process of the armed forces and, following his acceptance by the armed forces for training and service, he refused to submit to induction. [155] He remained at Fort Jackson until released by an order of the court below upon appeal from the judgment of the District Court for the Eastern District of South Carolina remanding him to the custody of the armed forces. [156-157]

The details of what happened to petitioner from September 30, 1943, to the date of his discharge are too well known to this court to require restatement.*

* See 53 F. Supp. 583; 148 F. 2d 288; 66 S. Ct. 423.

The trial court received the testimony of Smith's mother—one of Jehovah's witnesses—about his background and training. [48-51] She testified about his intention to enter the full-time ministry at the time he graduated from high school, [53] about his activity as a minister from 1938 to date, [52-61] which testimony corroborated that of petitioner.

Louis Smith, father of petitioner, testified that his son intended to enter the full-time pioneer ministry upon his graduation from high school. [63] He corroborated the testimony of Mrs. Smith and petitioner that he was prejudiced against his son becoming a minister of Jehovah's witnesses. [61-72] He said that his antagonism and threats were so severe that he forced his son to enter the University of South Carolina to prevent his becoming a full-time minister. [61-72] He said that he selected the course and made his son continue therein until 1943. [61-72]

Several other witnesses—all of whom, except one, were Jehovah's witnesses—testified extensively as to the training, background and activity of petitioner as a student preparing for the ministry and as a minister of Jehovah's witnesses. Their testimony corroborated in every respect the testimony of petitioner concerning his ministerial status and activity. [72-91, 91-93, 93-98, 99-111, 111-116]

How Issues Raised

At the close of all the evidence petitioner moved for a judgment of acquittal on the grounds that the undisputed evidence showed that the orders of the administrative agency to be made without basis in fact, contrary to the undisputed evidence, in excess of statutory authority, without jurisdiction, contrary to the Act and Regulations, and contrary to the due process clause of the Fifth Amendment to the Constitution. [189-190] Moreover, it was asserted that the action of the administrative agency was

arbitrary and capricious. [189-191] In the motion it was claimed that there was no evidence showing that petitioner is not a minister of religion as claimed; there was no evidence before the local board, appeal board or the court showing the petitioner is not a minister of religion as claimed and established by his evidence; that the undisputed evidence showed that he was regularly performing duties as a minister of religion within the meaning of the Act and Regulations. [189-190] In the motion petitioner also contended that the undisputed evidence showed that the local board frustrated his appeal to the board of appeal by withholding evidence submitted to the local board and which was considered by it in that the local board refused and failed to reduce to writing oral evidence given by petitioner at his personal appearance. [191] Petitioner contended that the undisputed evidence showed that the local board had violated Sections 625.2 and 627.13(b) of the Selective Service Regulations in withholding such evidence from the board of appeal. [191] Moreover, petitioner contended that the local board illegally and capriciously denied him the right to have his case reopened and his ministerial status reconsidered. [192] It was claimed, as one of the grounds for the judgment of acquittal, that this action was contrary to Sections 626.1, 626.2 and 626.3 of the Regulations. [192] An additional ground for the judgment of acquittal was that the order to report on which the indictment was based was void on its face because signed by the Clerk of the local board who was not authorized to issue and sign the order in the manner required by the Regulations, Sec. 603.59. [192]

Specification of Error

Upon this petition for writ of certiorari petitioner urges that the court below erred in not holding he was entitled to a judgment of acquittal at the close of all the evidence.

Reasons Relied on for Granting the Writ

The failure of the court below to hold that petitioner was entitled to a dismissal of the indictment because the undisputed evidence showed that there was a violation of procedural due process by the administrative agency in withholding evidence from the board of appeal, by failure to reduce to writing evidence considered by the local board conflicts with *Kwock Jan Fat* v. *White,* 253 U. S. 454.

The holding of the court below that an issue of fact for determination of the jury sufficient to justify a denial of the motion for judgment of acquittal on whether petitioner actually gave additional evidence is in conflict with *Social Security Board* v. *Warren* (CCA-8, 1944) 142 F. 2d 974; *Walker* v. *Altmeyer* (CCA-2, 1943) 137 F. 2d 531; *Williams* v. *United States* (CCA-7, 1942) 126 F. 2d 129, cert. den. 317 U. S. 655; *Carroll* v. *Social Security Board* (CCA-7, 1942) 128 F. 2d 876.

The holding of the court below that the interest of petitioner under the circumstances was sufficient to raise an issue of fact for submission to the jury the question of whether the draft board violated due process of law is in conflict with *Mack* v. *Dailey* (CCA-2) 3 F. 2d 534, 538-539; *Burdon* v. *Wood* (CCA-7) 142 F. 2d 303, 305; *Mass. Protective Ass'n* v. *United States* (CCA-1) 114 F. 2d 304, 309.

If the Court fails to find a conflict between the decision of the court below and decisions of other circuit courts of appeals, then petitioner says that there is presented an important question of federal law which has not been, but ought to be, decided by this Court: Where the undisputed evidence shows that evidence was submitted at a hearing before an administrative agency and the records of the agency concededly establish that there was a failure to reduce it to writing, as required by the administrative regulations, does the interest of petitioner make the question of law become a question of fact for the jury to decide

merely because petitioner is interested in the outcome of the controversy?

The failure of the court below to hold that there was no basis in fact for the classification given petitioner and that, in denying his claim for exemption the board acted arbitrarily and capriciously, is in direct conflict with the holding of the United States Circuit Court of Appeals for the Seventh Circuit in *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633 where the facts are substantially the same as those in the case at bar. Moreover, the holding of the court below is out of harmony with the dictum expressed on the same question in *Lehr* v. *United States* (CCA-5) 139 F. 2d 919, 921-922, and in *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, 949. The holding of the court below that petitioner's activity was nothing more than activity of a lay worker of a religious organization and was not that of preaching as a minister is directly in conflict with decisions of this court in *Murdock* v. *Pennsylvania* (1943) 319 U. S. 105, 106-109, 110, 111, 117, and *Follett* v. *McCormick,* 321 U. S. 573, where the facts in reference to the ministerial activity were identical with the facts in this case. In those decisions this court held that the activity of Jehovah's witnesses occupied the same high estate as do orthodox preaching from the pulpit. Furthermore, the court held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

The narrow orthodox construction placed upon the terms of the Act and Regulations providing for exemption of ministers of religion is a decision on an important question that is probably in conflict with the applicable decisions of this court. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosario de Filipinas,* 263 U. S. 578; *Helvering* v. *Bliss,* 293 U. S. 144.

There are important questions of federal law presented

upon this petition which have not been, but which should be, settled by this court. They are set out below:

(a) What is the proper definition of the terms "regular minister" or "duly ordained minister of religion" used in Section 5 (d) of the Act? (Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. § 305)

(b) Did Congress intend to confine exemption conferred by the Act to ministers of the orthodox religions?

(c) Did Congress intend to exclude from the exemption conferred by the Act the "regular" and the "duly ordained" ministers regularly or customarily performing their duties and who performed their ministerial services gratuitously?

(d) Did Congress intend that a regular minister of religion, regularly performing his duties, or an ordained minister customarily performing his duties, could be denied his exemption and the draft board denying it have basis in fact for its action because the minister attended college to further his education while not engaged in performance of his ministerial duties?

(e) Did Congress intend that a broad and liberal interpretation should be put upon the ministerial exemption in the Act so as to include the regular and duly ordained ministers of every recognized religious organization within the United States?

(f) Did Congress intend to limit the ministerial exemption provided in the Act to only some ministers of some denominations?

The decision of the court below interpreting the Act and Regulations is in direct conflict with the administrative interpretation placed upon the Act and Regulations by the National Headquarters of the Selective Service System in State Director Advice 213-B. The National Headquarters of the Selective Service System says that "the *regular* discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified" as a minister of religion. (Emphasis added)

The court below in construing the Act and Regulations contradicts this statement.

The National Headquarters of the Selective Service System says that the "historic nature of the ministerial function of a registrant's *own religious organization must be taken into consideration in each individual case.*" (Emphasis added)

The court below in construing the Act and Regulations contradicts this statement.

The National Headquarters of the Selective Service System says that whether one of Jehovah's witnesses is to be classified as exempt "must be determined in each individual case based upon whether he *devotes his life* in the furtherance of the beliefs of Jehovah's witnesses, whether he *performs functions which are normally performed* by regular or duly ordained ministers of other religions, and finally, *whether he is regarded by other* [of] *Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.*" (Emphasis added)

The court below in construing the Act and Regulations contradicts this statement.

Additional federal questions are presented upon this petition which have not been, but which ought to be, settled by this Court:

(g) Did the refusal of the local board to reopen petitioner's case in September 1943 after having failed to reduce to writing evidence received and considered upon the personal appearance constitute arbitrary and capricious action on the part of the local board so as to warrant a dismissal of the indictment?

(h) Was the order to report for induction, not signed by a member of the local board but by the clerk who was not authorized by resolution duly adopted and entered in the minutes of the local board, a valid order?

The court below so far departed from the Selective Service Regulations covering the conduct of local boards, and misconstrued them, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to halt the same. This case is one that should call for the exercise of this Court's supervisory power under the statute and the rules of this court.

WHEREFORE your petitioner prays that the writ of certiorari issue to the Circuit Court of Appeals for the Fourth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court. Petitioner further prays that the judgment of conviction entered by the District Court be here set aside, the indictment ordered dismissed and petitioner discharged from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this court's opinion, as ordered by the court below. Your petitioner should be granted such other and further relief as to this court may seem just and proper.

LOUIS DABNEY SMITH
Petitioner

By HAYDEN C. COVINGTON
CURRAN E. COOLEY
GROVER C. POWELL
Counsel for Petitioner

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.*

ARGUMENT

ONE

The local board denied Smith procedural due process in withholding from the board of appeal and the President, upon appeal, oral evidence received and considered by the local board upon a personal appearance, and thereafter in refusing to reopen his case upon a tender of written evidence covering the points the local board had previously failed to reduce to writing and forward to the board of appeal, as required by the Regulations.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia,* "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained

* For special reasons warranting the granting of petition submitted herein see conclusion of this supporting brief, pages 38-39, *infra.*

in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2(b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13(b))

Section 627.13(b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for petitioner's right under the regulations.

The undisputed evidence showed that the local board failed to reduce to writing and place in Smith's file vital oral evidence submitted by him at a personal appearance relative to his status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received and considered by the local board. [28-29] The local board, although it did consider the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the regulations. The board of appeal and the President did not see or have an opportunity to consider all the additional evidence. Neither of them knew of the action of the local board in withholding vital oral evidence received and considered.

Inasmuch as no classification is permanent (Sec. 626.1) it was especially the duty of the local board to receive additional written evidence following the return of the file by the President. Upon the return of the file, Smith

saw that he had been injured by false information given him by the local board that it was unnecessary to submit additional written evidence. The local board, having violated the regulations by failing to summarize in writing the oral evidence given by Smith, was required to receive the vast amount of documentary evidence offered to it in September 1943. The local board, as a matter of law, should have reopened and considered anew the classification as requested by the Government Appeal Agent and Smith when tendered Exhibit I containing a vast amount of documentary evidence irrefutably establishing all the facts given to the local board orally and considered by it on May 25, 1943, at the hearing.

Section 626.2 of the regulations provide that 'the local board may reopen and consider anew a registrant's classification upon written request of the Government Appeal Agent or the registrant, presenting facts *in writing* not considered when the registrant was classified which, if true, would justify a change in the registrant's classification.' It should be observed that the facts presented in writing were not considered by the board of appeal or the President who gave the final classification and who therefore did not have an opportunity to consider any of these facts set forth in the documentary evidence.

If a local board fails to reduce to writing oral evidence and which was received and considered by it, thus withholding such evidence from the appellate agencies of the Selective Service System, and thereafter refuses to reopen a classification upon the tendered written evidence showing the facts that were not considered by the appellate agencies, the local board will have been created an autonomous agency and the appellate agencies of the Selective Service System made impotent, null and void and forced to depend for their effective operation exclusively upon the whim, caprice and will of the local board. If the regulation on

reducing oral evidence considered by the local board to writing and the regulation on reopening a classification is each held to be for the benefit solely of the local board and that the judgment of the local board thereon is final, then the appellate agencies of the Selective Service System will have been deprived of their right to correct errors and illegal acts committed by the local board, contrary to the regulations.

Certainly Congress and the President did not intend to give the local boards unlimited power to withhold and keep from the appellate agencies evidence offered to it and considered by it under the regulations. This is especially true because classifications upon appeal are made *de novo* and such classification should be made according to the status of the registrant at the time of the classification rather than at the time of the registration of the registrant. *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633.

It seems inexorable that the local board should have reopened and reconsidered petitioner's classification, because of its arbitrary and defiant refusal and failure to reduce to writing petitioner's oral evidence received and considered by it at his personal appearance.

It was argued by the court below that *Cramer* v. *France* (CCA-9) 148 F. 2d 801, 804, and *United States ex rel. La Charity* v. *Commanding Officer* (CCA-2) 142 F. 2d 381, 382, are in point. These decisions held that a registrant did not have a right to reopen his case as a matter of right, and that the refusal of the administrative agency to reopen the classification was not ground for invalidating the subsequent orders commanding the registrants to perform military service. In neither case was it shown that the local board failed to comply with regulations prescribing the procedure for reducing to writing oral evidence and filing the same as required by the regulations.

In each case the board of appeal had opportunity to review and consider the evidence submitted on the request for reopening of the classification. In both cases the administrative agency accorded the registrants their rights of procedural due process. Inasmuch as the board of appeal did not have opportunity to review the illegal action of the local board by reason of its withholding oral evidence, contrary to the regulations, and its purloining the documentary evidence submitted by petitioner later on, there was a rank denial of the right of procedural due process which distinguishes the *Smith* case from the *Cramer* and *La Charity* cases, *supra.*

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country."

The withholding of evidence by the local board denied

the final and real classifying agency of the Selective Service System the right to a full review of petitioner's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below should have held that the illegality of the order was ground for a dismissal of the indictment and a remand of the case to the Selective Service System. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States* v. *Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (USDC-ND Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

How it can be expected that the evidence upon another trial will be different is difficult to comprehend. The chairman of the board admitted that the board considered all the evidence given by Smith at the May 25 hearing. The records of the board show that none of the evidence was reduced to writing as required by the Regulations. Even the records of the board show that the hearing on May 25 was extended and long. The Government in the trial below made no effort to contradict the testimony of Smith. It must be assumed for purposes of decision of this question that the evidence was fully developed and no good purpose will be subserved by remanding the case to the trial court for another trial. The court below erred in holding that the evidence may be different on another trial.

TWO

The administrative agency, at the time of the final classification, acted arbitrarily and capriciously, contrary to the undisputed evidence, and without basis in fact, when it denied petitioner his claim for exemption as a minister of religion, all of which action was in excess of the jurisdiction of the administrative agency and contrary to law.

The petitioner was entitled to be classified according to his status as of the date of the last classification. His status was not to be determined as of April 6, 1943, when the local board classified him for the first time. It is not to be determined as of May 18, 1943, when he was placed in Class I-A-O. Moreover, his status is not to be determined as of May 25, 1943, when he appeared before the local board. The determination of his status must be according to his status as it existed on the date the President classified him in August 1943. It should be remembered that in August 1943, he had been a full-time pioneer missionary for more than three months. He had informed the local board in May 1943 of his intention to discontinue his engineering course at the university and enter the full-time ministry, which it had been his intention to do ever since he graduated from high school. The undisputed evidence shows that at the time of his final classification, in August 1943, he was acting as a full-time pioneer minister. Moreover, it shows that he was acting as assistant to the presiding minister of the Columbia, South Carolina, congregation of Jehovah's witnesses. It established beyond cavil that he stood in relation to that congregation as do the orthodox clergy of the more popularly recognized denominations. The evidence showed that his entire life was devoted to the furtherance of the teaching and preaching of the principles and

beliefs of Jehovah's witnesses. Therefore, as a matter of law, petitioner was entitled to be classified in IV-D as a minister of religion as of the date the President classified him in August 1943 and his status as a part-time minister as of April and May 1943 is wholly immaterial.

This conclusion here contended for is supported by the decision of the Seventh Circuit Court of Appeals in the case of *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633. There the facts were on all fours with the case at bar. There Hull —one of Jehovah's witnesses—filed a questionnaire showing he was preaching the gospel as a part-time minister of Jehovah's witnesses and was engaged in secular work as a stenographer for a pottery company in Crooksville, Ohio. Like Smith, he had been intending all his life to enter the full-time ministry. Before his final classification he informed the local board that he intended to start in the full-time ministry in September 1941. However, he did not actually begin in his assigned territory until October 1941. On September 18, 1941, the local board placed him in Class I-A-O. In other words, like Smith, while his case was pending before the local board, he changed his status from part-time to full-time minister. The Seventh Circuit Court of Appeals held that the District Court was correct in concluding that Hull was entitled to be classified as of the date of his final classification.

It is conceded that Jehovah's witnesses and their legal governing body have been duly recognized by the Selective Service System under the Act and Regulations as being a religious organization within the meaning of the Act.* Moreover, it has been administratively determined that ministers of that organization regularly preaching and teaching as ordained or unordained ministers are entitled to classification in Class IV-D.* The undisputed evidence before the draft board and before the court below showed

* Opinion No. 14, amended November 1942. [256-260]

that at all times material herein defendant never had any secular employment. The undisputed evidence at the time of his final classification was that he was engaged regularly in teaching and preaching to others as a minister of Jehovah's witnesses and presiding over the local congregation. Not only did he devote 80 hours monthly while attending college to the performance of his ministerial duties, but also devoted other time to regularly preaching and delivering sermons before the congregation. The congregation recognized him as standing toward its members in the same capacity as do the orthodox clergy of the more popular religious organizations. He was duly authorized to act as the assistant to the presiding minister. In this connection the evidence shows that petitioner devoted more time to the preaching work than did the presiding minister. Because of this the presiding minister delegated to petitioner much of his responsibility and duty. The presiding minister was engaged in secular work six days weekly, devoting only part of his time to preaching. However, his local board placed him in Class IV-D, exempting him as a minister of religion.*

His standing, activity, preaching from the pulpit and congregational duties brought petitioner squarely alongside the popularly recognized standing of clergymen of the more favored and more readily recognized religious organizations. His activity as a missionary evangelist, being primarily ordained and authorized to preach as such, and regularly engaged as such, alone should be sufficient basis to justify a IV-D classification. However in addition to his activity, he performs the congregational duties which fortify his claim as a minister. This makes

* It should be observed that the board that granted presiding minister Crout exemption as a minister was different from the board with which petitioner was registered, but showed a disposition to be fair and not, as petitioner's draft board, arbitrary and capricious as is manifest from the record.

it impossible for the Selective Service System lawfully to say that he is not a minister of religion within the meaning of the Act and Regulations.

Smith did not become a minister when he began to do pioneer service. Undisputed evidence showed he was a minister before he became a full-time pioneer minister.

"The phrase 'minister of religion' is wide enough to embrace any evangelical office, and has about it more of the savor of humility than 'pastor'." *Encyclopædia Britannica* (13th ed.) Vol. 18, p. 542.

"Minister" or "minister of the gospel" is a comprehensive term and of uncertain significance. Ministers are spoken of as public teachers of piety, religion and morality. (New Hampshire Constitution, Art. 6) They are sometimes called "ministers of the gospel" and sometimes "ordained ministers of the gospel", a term less comprehensive in its significance. *Kidder* v. *French*, N. H., Smith, 155, 156.

A statute pertaining to authority to perform marriages by clergymen includes ministers of every denomination and faith. *Haggin* v. *Haggin*, 35 Neb. 375, 53 N. W. 209, 211.

"Ministers" as used in a tax exemption statute includes a person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church though he had no authority to administer the sacrament of the communion. *Baldwin* v. *McClinch*, 1 Me. (1 Greene) 102, 107.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemption, saying: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any reli-

gious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

The same liberal interpretation that was placed upon the Act and Regulations, and as construed and applied to the activity of one of Jehovah's witnesses upon facts identical to the facts here, by the Seventh Circuit Court of Appeals, should be adopted by this court and applied to the facts in this case so as to reach the same conclusion as was reached in *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633. That court said:

" . . . In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized charge [*sic*, properly 'church'], religious sect, or religious organization of which he is a member * * *.' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church * * *.' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated: 'The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit

or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or its goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. • • • He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. • • • To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant.'"

The only two circumstances relied upon by the draft boards in not granting petitioner his ministerial exemption and classification in Class IV-D were (1) that the information in his questionnaire showed that he was going to college studying to be an engineer, and (2) the fact that his name was not listed with National Headquarters of the Selective Service System. He satisfactorily explained his reason for attending college. He showed beyond cavil that his lifelong desire was to become a minister. The only reason he attended college was because of fear of his father. However, the facts showed without dispute that he flunked his college course because of devoting too much of his time to the ministerial work. The fact that his name was

not on the certified official list cannot be taken as grounds for denial.

The certified list circulated by National Headquarters did not include all male pioneers, full-time ministers, because at the time of the first registration only the names of individuals between the ages of 21 and 35 were required to be submitted by National Headquarters. Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the certified official list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the person whose name was to be added to the list. Upon the February 1942 Selective Service registration a number of full-time pioneer ministers of Jehovah's witnesses were automatically added to the list because of their having been in the full-time missionary evangelistic work on June 12, 1941, when the first certified official list was promulgated. The reason their names were not on the original certified official list was because they were not of the age bracket then liable for training and service.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of the National Headquarters of the Selective Service System having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that the National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the certified list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the National Director of Selective Service changed the policy regarding the adding of names to the official list, and discontinued the practice of

placing new names upon the certified list. On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified list. The Opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion." [259]

The failure of one of Jehovah's witnesses to have his name to appear upon the certified official list circulated by the Director of Selective Service to all State headquarters in the Selective Service System does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official list of pioneer ministers referred to in State Director Advice No. 213-B does not authorize the board to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards."

The two grounds of objection urged by the Government

in the court below against petitioner's claim for exemption as a minister of religion are unequivocally answered by the Seventh Circuit Court of Appeals in its decision in the *Hull* case (151 F. 2d 633) where the court said: "True, his questionnaire disclosed that he was not a full time minister, part of his time being devoted to secular occupations. The questionnaire, however, also disclosed that commencing September 1, 1941, he expected to cease his secular activities and devote all of his time to ministerial work. That his intention in this respect was fully performed is not open to dispute. There is not a scintilla of evidence upon which a contrary conclusion or even a reasonable inference could be predicated. The fact that his name was not included as a minister of Jehovah's witnesses at National Headquarters of the Selective Service is of little or no consequence under the facts of the case. While it perhaps was a circumstance to be considered by the Board, it constituted no proof as to relator's actual status. Furthermore, the practice of placing names upon this list was discontinued by the National Director of Selective Service on November 2, 1942 (relator was finally classified February 3, 1943)."

Reference is here made to Petitioners' Joint Brief in *Smith* v. *United States* and *Estep* v. *United States,* Nos. 66 and 292, October Term 1945, under point FIVE, pages 131-190, and to Petition for Writ of Certiorari in *Swaczyk* v. *United States,* No. 290, October Term 1946, where this point has been extensively argued. That argument is incorporated here as though copied at length herein.

THREE

The undisputed evidence shows that the order of the administrative agency commanding Smith to report for induction was invalid because not issued or signed by a member of the local board as required by the Regulations. Therefore it is an invalid order and a nullity.

The undisputed evidence showed that the clerk signed the order to report for induction. [10] The undisputed evidence showed that this order was not authorized by a resolution entered in the minutes of the local board. [11-12, 18-19] Section 603.59 of the Regulations authorizes a clerk to sign official papers of the local board which includes an order to report for induction only when directed by the local board so to do through a resolution duly adopted by and "entered in the minutes of such local board". It should be remembered that "The authority of the local boards whose orders are the basis of these criminal prosecutions is circumscribed both by the Act and by the regulations. . . . ¶Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction" is invalid and vitiates the criminal proceedings. *Estep* v. *United States*, 66 S. Ct. 423, 426-427.

It is true that the chairman of the local board testified, over the objection of petitioner, that the members of the local board authorized the clerk to sign. However, the undisputed evidence shows that no entry in the minutes of such resolution was ever made, in spite of the fact that the local board had, according to the undisputed evidence, a minute book at all times that the board was in operation.

Moreover, even the testimony of the chairman failed to show that the particular clerk who signed the order issued to petitioner was authorized by the board to sign the order.

He testified that when the board was first established the clerk then serving was authorized to sign, but the evidence showed that there was a different clerk at the time here involved. At the time of the Smith order, a new clerk had been appointed. There is absolutely no evidence to show that the clerk serving when he sent the order to Smith was ever authorized at any time to sign any order or paper. The failure of the board to comply with the regulations by entry of the alleged resolution invalidates entirely the alleged oral order given by the members of the board to the clerk authorizing him to sign the papers, if the board in fact ever gave such order.

The testimony of the chairman is highly unsatisfactory. It savors of fabrication. The chairman first attempted to justify his testimony that no minutes were made of such a resolution on the ground that at that time no minute book was kept by the board. When the minute book was produced, he was impeached because it appeared that the board had a minute book ever since its inception, and particularly at the time the chairman alleged that the resolution was made. The effort of the chairman to explain this is wholly unsatisfactory.

In any event, regardless of the testimony of the chairman in his vain effort to bolster the signature of the order by the clerk, the very fact that the Regulations required that the resolution be recorded in the minutes, and the undisputed evidence that there was no entry made, nullify, as a matter of law, all the testimony which was foisted upon the court and jury by the Government and its witness, the local-board chairman.

The Regulation is mandatory. It cannot be circumvented by a judicial holding that the Regulation is immaterial, technical. All laws are technical. Violation of any essential technicality of a law is as much a violation as is a more serious infraction. If one element of law can be set aside

as inconsequential, then the entire law, indeed, all laws, can be set aside as being of no consequence.

The clerk's error in signing *without authority* the order to report invalidated it. That error is underscored by the board's error in omitting to make due record of even its claimed informal empowering of the clerk.

The clerk's unauthorized act destroyed the order as the basis for indictment of the registrant, as much as though the order had been unsigned, or the signature had been forged by a stranger unauthorized to sign. Here due authorization and authorization of record are of the very essence of the administrative process. Omission of the act of authorization and of the due recordation of such act jointly constitute a basic and fatal defect. Neither judicial dictum nor judicial silence respecting those omitted essentials can cure that fatal defect.

Conclusion

It is necessary for the Supreme Court to grant the writ of certiorari so that the Government and petitioner may know whether or not he is entitled to a judgment of acquittal upon the evidence as it stands now. The evidence on another trial will not be materially different than it is at this time, especially with respect to (a) the violation of petitioner's rights by the local board's failing to reduce to writing the oral evidence it considered on the hearing held May 25, 1943, (b) the local board's failing and refusing to reopen his case after a miscarriage of administrative appellate process, and (c) the local board's failure to properly authorize its clerk to sign the order to report for induction as is required by the Regulations.

The petitioner, upon all the evidence, being found by this Court to have been entitled to a directed verdict and a judgment of acquittal, he is entitled to know that now so as to avoid another trial. The court below has sent him back

to the district court for his *fourth* hearing and trial. This case ought to be terminated now if petitioner is entitled to its termination as a matter of law. Certainly he should not be put to the inconvenience of trying the case over again, taking another appeal to the circuit court and then coming again to this Court when the questions can be determined now by this Court and settled once and for all.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the errors committed; and petitioner further prays that the judgment rendered by the circuit court of appeals be modified so that the judgment of the district court against petitioner will be reversed and petitioner discharged or, in the alternative, such relief being denied, that the judgment of the court below be affirmed so that the judgment of the district court will stand reversed and a new trial ordered.

Respectfully submitted,

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